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No. 95-1533

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MOOSE LODGE #259 (Salt Lake City) and
MOOSE LODGE #2103 (Tooele),

Petitioners,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of the State of Utah

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Utah Civil Rights Act, which prohibits gender discrimination by private liquor clubs, is a rational exercise of state police power under the Twenty-first Amendment of the United States Constitution.

2. Whether a private liquor club's First Amendment right of free association is implicated when the club chooses to submit to intense state liquor regulations in exchange for becoming a market participant in the state liquor industry.

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BRIEF IN OPPOSITION

Respondent, Utah Department of Alcoholic Beverage Control, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the opinion of the Supreme Court of the State of Utah on October 23, 1995.

STATEMENT OF FACTS

Only a finite number of restaurants and private clubs are granted the privilege of selling liquor in Utah. Such liquor licensees must purchase all alcoholic beverages from the state. Private liquor clubs, like licensed restaurants, must make certain quantities of food available to members or guests who wish to purchase alcohol.

The State of Utah has one of the most extensive liquor regulatory schemes in the country. Strict regulations govern the location, time of day, and means by which all forms of alcohol may be sold or served at private liquor clubs and restaurants. All liquor licensees are subject to unannounced searches of their premises to ensure compliance with the Utah Alcoholic Beverage Control Act (UABC), Chapter 32A of the Utah Code. Sexually provocative entertainment, acts, or dress is strictly prohibited. The Alcoholic Beverage Control Commission (The Commission) must approve the articles of incorporation and by-laws before a liquor license may be issued. Amendments to by-laws or articles of incorporation are invalid unless submitted to the Commission for approval within ten days. Public restaurant liquor licensees are subjected to equally rigorous restrictions. Contrary to the Moose's implication (Moose Petition, p. 4), neither public nor private liquor licensees may advertise alcoholic beverages to the public. Utah Code Ann. §§ 32A-4-106(21) and -5-107(23).

Private liquor clubs are non-profit corporations incorporated for the purpose of obtaining a liquor

license to store, sell, serve, or consume liquor. (App. 82-83). Liquor clubs may not be used for gambling or any other violation of law or ordinance. All liquor licensees are also subject to the gender discrimination prohibitions in the Utah Civil Rights Act (UCRA), Utah Code Ann. §§ 13-7-1 through -4 (1992). All private liquor clubs are considered "enterprises regulated by the state" under Utah law and as such acquire a "quasi-public status whenever engaged in the buying or selling of alcohol." (App. 23).

Petitioners are Moose Lodges which hold private club liquor licenses under Utah Code Ann. §§ 32A-5-101 through -108 (1991 and Supp. 1993). Under state law, the Moose are no different than any other private eating and drinking club with the notable exception that their by-laws prohibit women from becoming members of their private liquor clubs or "Social Quarters."

Aside from the by-laws and club rules, however, the Moose in practice do not allow women to become members of their private liquor clubs. Therefore, they cannot become officers, directors, or exercise legal authority over the liquor club business. Females may appear only as "qualified guests" in the liquor club (Social Quarters), thus prohibiting women from bringing male or female friends as guests as is necessary when socializing for professional or personal reasons. On the other hand, males and females freely associate with each others during regular business hours of the liquor club.

The Commission's interest in the Moose extends only to the use of state liquor licenses on the premises of their liquor club or social quarters. The Commission is

not concerned with meetings or activities outside the liquor club (Social Quarters). Utah law declares that gender discrimination in private liquor clubs endangers the health, safety, and general welfare of the state and its inhabitants and violates state public policy. The Commission is charged by statute to protect the public interest and the public health, peace, safety, welfare, and morals. In furtherance of this duty, the Commission issued a directive requiring all private club liquor licensees to attest to the Department of Alcoholic Beverage Control (The Department) that they do not discriminate on the basis of race, sex, or religion and that their by-laws, constitutions, or articles of incorporation do not contain discriminatory language. The Commission further directed that the licenses of all private clubs who failed to comply with this directive would be revoked. This directive has the force of law and served to clarify and notify all private clubs regarding their duty to abide by the provisions of the Utah Civil Rights Act (UCRA).

In response to the Commission's directive, some private clubs changed their by-laws to eliminate unlawful discrimination while several Elks Lodges surrendered their liquor licenses and set up new private liquor clubs on the premises where the Elks' liquor clubs previously existed. Without the liquor license, these Elks Lodges are free to discriminate on the basis of race, sex, and religion.

The Moose failed to comply with the Commission's directive in that they failed to sign unequivocal attestations that they do not discriminate and they failed to remove discriminatory language from their by-laws and rules. After an evidentiary hearing,

the Commission found that the Moose discriminate against women by denying full and equal accommodations, advantages, facilities, privileges, goods, and services on the basis of gender. The Commission further found that the practice of gender discrimination endangers the public health, welfare, safety, and general welfare of this state and its inhabitants and violates the public policy of this state and that the purposes of Utah liquor laws are the protection of the public health, peace, safety, welfare, and morals. The Commission finally found that the By-Laws, Constitution, and operation of the Lodges are not consistent with the purposes of the ABCA. (App. 63-64).

SUMMARY OF ARGUMENT

This case involves a state liquor regulation which prohibits discrimination based upon race, sex, or religion in the limited number of corporations privileged to sell and serve liquor on behalf of the State of Utah. The case has little significance outside of Utah in that the ruling is based upon liquor regulations and civil rights laws unique to Utah. The decision does not create a conflict in federal law with other appellate courts.

All claims asserted by the Moose were resolved several years ago by decisions of this court. In *California v. LaRue*, 409 U.S. 109 (1972) and later in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), this court ruled that states have the authority to place significant restrictions on First Amendment rights by curtailing certain forms of entertainment in state-licensed liquor clubs. Restrictions on the sale of liquor which are not

"irrational or unreasonable" must be upheld as a valid exercise of a state's power under the Twenty-first Amendment.

This court further decided several years ago that states have a compelling interest "of the highest order" to prevent sex discrimination in large social organizations. See *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). This court ruled that First Amendment association rights of large social clubs must give way to the state's interest in preventing discrimination. This is not to say that the prevention of gender discrimination should always override the association rights of all organizations. However, since the Moose constantly associate with women guests during all liquor club hours while eating meals and attending social events, like the Jaycees and Rotary, very little association rights are implicated.

The Utah Supreme Court's decision in this case, is much more compelling than the facts of *LaRue*, *Bellanca*, *Rotary Club*, or *Roberts* since it deals with a state's authority to regulate alcohol under the Twenty-first Amendment and its police power to prevent sex discrimination among its liquor retailers. By using its powers under the Twenty-first Amendment to prevent discrimination based upon race, sex, or religion in state-licensed liquor establishments, the state's actions in this case fall within the realm of acceptable state authority under existing Supreme Court precedents.

The Commission's directive prohibiting discrimination and requiring non-discriminatory language in the by-laws of private club liquor licensees

provided sufficient specificity and clarity to eliminate any claims of vagueness or overbreadth as applied to the Moose. Moreover, the UCRA, as interpreted by *Beynon v. St. George-Dixie Lodge # 1743*, 854 P.2d 513 (Utah), cert. denied, 114 S.Ct. 195 (1993), explicitly prohibits discrimination in all private liquor clubs. Therefore, the suspension of the Moose liquor licenses for sex discrimination did not deprive the Moose of any federal right.

Utah has a strong tradition of closely regulating and monitoring alcohol sales and consumption based upon its general police powers to protect the public health, peace, safety, welfare, and morals. It is also Utah State policy to prevent discrimination among its limited number of liquor licensees. The Twenty-first Amendment allows states more power than the normal police powers to strictly regulate the liquor industry. Prohibiting discrimination and violations of Commission directives among liquor licensees are legitimate police actions between a state and its liquor retailers.

The Moose cite many cases to support their claim that the UCRA and the ABCA are unconstitutional. However, none of the cases cited by the Moose deal specifically with a state liquor regulation prohibiting gender discrimination in a private club pursuant to the state's police powers under the Twenty-first Amendment. Such facts are crucial in determining the applicable standard for constitutional review.

REASONS FOR DENYING THE PETITION

POINT I

NO IMPORTANT FEDERAL ISSUE IS PRESENTED BY THE MOOSE

The Utah Supreme Court's decision was based solely upon Utah's unique tradition of strictly regulating all aspects of the sale, service, and storage of alcoholic beverages. This regulatory scheme has spawned a limited number of restaurant-type drinking and eating clubs where persons can drink alcoholic beverages while socializing. These social drinking establishments are classified as private liquor clubs. See Utah Code Ann. §§ 32A-5-101 to -108 (1991 and Supp. 1993).

By statute, the Commission may authorize a finite number of private club liquor licenses. It therefore has a duty to ensure that over half of the eligible drinking population is not arbitrarily excluded from drinking, socializing, and fostering business opportunities at private liquor clubs. Under Utah law, the Moose, as private club liquor licensees, are indistinguishable from other drinking and eating clubs which by law must be private, non-profit corporations. The major reason for these private club regulations is to discourage and control the consumption of alcoholic beverages. Few, if any, other states have substantially similar private liquor clubs.

The decision of the Utah Supreme Court will have virtually no impact on other states in that Utah's liquor control and civil rights statutes are unique to Utah. The Moose cannot cite any holdings of other State Supreme

Courts or Circuit Courts of Appeals which conflict with this Utah decision. The issues presented by the Moose do not involve an "important question of federal law which has not been, but should be settled by this Court." Sup. Ct. R. 10.1(c). To the contrary, the Utah Supreme Court's decision falls clearly within the limits of the decisions of this court dealing with a state's power to regulate liquor under the Twenty-first Amendment and its compelling interest in preventing gender discrimination in large social and business organizations.

POINT II

UTAH'S LIQUOR REGULATIONS, WHICH PROHIBIT DISCRIMINATION BASED ON RACE, SEX, AND RELIGION, DO NOT VIOLATE THE LIMITED ASSOCIATION RIGHTS OF THE MOOSE

This court ruled several years ago in *California v. LaRue*, 409 U.S. 109 (1972) and later in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), that states have the authority to place significant restrictions on First Amendment rights by curtailing certain forms of entertainment in state-licensed liquor clubs. The Moose virtually ignore these precedents citing mainly to cases dealing with state action, the boy scouts, or private parades which have little relevance to the liquor regulations at issue in this case. The Moose's claims regarding "unconstitutional conditions" and association rights stem from the same issue of to what extent a state may regulate its liquor industry. The prohibition against race, sex, and religious discrimination in Utah's liquor establishments, is a rational exercise of power

delegated to the state under the Twenty-first Amendment.

The Twenty-first Amendment allows states even more power than the normal police powers to strictly regulate all aspects of the liquor industry. *California v. LaRue*, 409 U.S. at 114. A state liquor regulation will be upheld, unless it is "irrational or unreasonable." Id. at 116. Moreover, a "presumption in favor of the validity" of a state liquor regulation is mandated by the Twenty-first Amendment. Id. at 118. "Wide latitude" must be given to the state agency that is the repository of the state's power under the Twenty-first Amendment. Id. at 116. Since the civil rights statute at issue in this case is a state restriction on the liquor industry, the state need not show a compelling interest or state action under the Fourteenth Amendment to justify its actions.

The Utah Legislature enacted a significant regulatory scheme to closely monitor all aspects of the liquor industry. "Citizens in Utah may purchase liquor only through state liquor stores (where no consumption is allowed), at licensed private clubs, or at licensed restaurants." (App. 22). The Commission is empowered by the Legislature to set the price and all policies and procedures relating to the purchase, sale, inventory, and storage of liquor. Utah Code Ann. § 32A-1-107. The state is an active market participant as a purchaser and wholesaler. The Moose, "by voluntarily applying for a liquor license, have agreed to become one of the relatively few organizations in [Utah] allowed to dispense liquor." (App. 23).

To obtain a private club liquor license, a non-profit corporation must meet numerous requirements.

For example, the club may not be used for gambling or any other violation of law or ordinance. Utah Code Ann. § 32A-5-105(2)(c). In addition, all liquor licensees are "enterprises regulated by the state" and subject to the anti-discrimination provisions of the UCRA. See, *Beynon*, 854 P.2d at 517-519. The Moose failed to show, or even raise the issue, that these regulations are "irrational and unreasonable" as required to invalidate a liquor regulation under the Twenty-first Amendment. See *LaRue*, 409 U.S. at 116.

Apart from regulating liquor, all states have the right, and sometimes the duty, to prohibit discrimination based upon race, sex, and religion. In fact, this Court ruled that prohibiting gender discrimination "plainly serves compelling state interests of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *United States Jaycees*, the Court held that the state's exercise of its police powers to prohibit gender discrimination outweighed First Amendment claims of freedom of association.

In this case, the Department relies upon not only its significant powers under the Twenty-first Amendment, but also its exercise of its police powers to prevent discrimination as an additional regulation on liquor licensees. These two separate grounds for state power combine together to defeat the Moose's claimed violation of their right of free association. Although their freedom of association claim is inapplicable because the Moose already associate with women during all business hours of the liquor club and could freely discriminate if they opted out of the liquor industry by surrendering their liquor licenses, even if they possessed significant association rights, the state's ability to

strictly regulate the liquor industry and its compelling state interest in preventing discrimination far outweighs any association rights of the Moose.

For years Moose members have regularly associated with women in the liquor club in that wives and female guests of members frequent the Lodge's drinking and eating place. They further voluntarily submitted to intense state regulation of the Social Quarters when they chose to become part of the state liquor industry by accepting the responsibilities and privileges of a state private club liquor license.

Under the UCRA, the Moose are considered "enterprises regulated by the state." Utah Code Ann. § 13-7-3(b) (1992); See also *Beynon*, 854 P.2d 517-519. Moreover, the Moose acquired a "quasi-public status whenever they engage in the buying and selling of alcohol" under Utah law. (App. 23). The Moose therefore, as private club liquor licensees, possess little, if any, association rights to discriminate on the basis of race, sex, or religion in their state liquor club.

Petitioners automatically assume that the First Amendment protects at all costs any possible freedom of association claim. However, case law does not support such a theory when liquor laws are combined with anti-discrimination laws.

If the Moose and Elks had a valid free association claim, the state's ability to strictly regulate liquor combined with its compelling interest to prohibit gender discrimination would override such rights. In the liquor control context, the state need only show that the liquor regulations are not unreasonable or irrational. See,

California v. LaRue, 409 U.S. at 116. The Moose failed to introduce any evidence at the lower stages of these proceedings which show that the civil rights liquor regulations are irrational and unreasonable. To the contrary, this Court acknowledged the need for such regulations even outside the liquor control context. See *Roberts*, 468 U.S. at 609.

Given the backdrop of an extremely limited measure of privacy enjoyed by Moose members, the state's power to strictly regulate the liquor industry, and the state's compelling interest to prevent discrimination, any association interests asserted by the Moose must fail. Buying, selling, and consuming liquor is a state privilege and not a constitutional right. Petitioners may not "reap the benefits of a liquor license without complying with the substantial responsibilities accompanying that license." *Beynon*, 854 P.2d 518.

POINT III

THE UTAH LIQUOR COMMISSION'S ACTION IN SUSPENDING THE MOOSE LIQUOR LICENSES FOR SEX DISCRIMINATION DID NOT DEPRIVE THE MOOSE OF A CONSTITUTIONAL RIGHT

The Moose focus on one of the three bases upon which the Commission relied to suspend their liquor licenses. Specifically they claim the state law requiring private liquor clubs to refrain from "gambling or any other violation of law or ordinance" is either over broad or vague. See Utah Code Ann. § 32A-5-105(2)(c) (1991). The Moose ignore the fact that the Utah Civil Rights Act explicitly prohibits gender discrimination in

private clubs and that the Commission issued a directive which further serves to clarify and notify the Moose of what the law and the Commission required. These facts alone preclude vagueness and over broad arguments as applied to the Moose. However, nothing in the wording "or any other violation of law or ordinance" is vague or overly broad.

Even the Twenty-first Amendment mandates compliance with all Utah liquor laws mandating: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited." U.S. Const. Amend. XXI, § 2. This amendment references similar wording of obeying all state laws, without specifying which laws must be obeyed. Therefore, Utah Code Ann. § 32A-5-105(2)(c) merely reflects what the Twenty-first Amendment already requires.

The first inquiry in an overbreadth challenge is to determine whether the enactment prohibits a substantial amount of constitutional protected activity. If it does not, the challenge will fail. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 489. The overbreadth doctrine is a "prophylactic concept applicable only to First Amendment claims." *Stites v. I.R.S.*, 793 F.2d 618, 620 (5th Cir. 1986). The doctrine does not apply to commercial speech. *Village of Hoffman Estates*, 455 U.S. at 497.

In this case, Utah Code Ann. § 32A-5-105(2)(c) prohibits liquor licensees from using their club to violate any state law. Since no protected First

Amendment activities are implicated by the wording, the challenge must fail.

Second, the statute is not vague. No reasonable person could arrive at a different interpretation. Furthermore, if the activity in question, as applied, is clearly proscribed, the law cannot be considered vague. Id. at 495. In this case, both the UCRA and the Commission's Directive clearly proscribe discriminatory conduct in the operation of private liquor clubs. They cannot now complain that they did not know they should not discriminate in the operation of their liquor club. Since the Moose had "fair warning" through the UCRA and the Commission's anti-discrimination directive, the liquor regulations, when taken as a whole, cannot be vague. *Id.* at 503.

Petitioners bear the burden of proving that the law is vague in all its application to the Moose, contrary to the holding of the *Atlanta Attractions, Inc. v. Massell*, 330 F.Supp. 865 (N.D. Georgia 1971), aff'd, 463 F.2d 449 (5th Cir.1972), relied upon by Petitioners, which incorrectly shifts the burden to the state to defend against all sorts of unusual applications. The fact that some unconstitutional applications can be "imagined" is insufficient to invalidate a state law. *Murphy v. Matheson*, 742 F.2d 564 (10th Cir. 1984).

CONCLUSION

The Moose petition does not present an important issue of federal law. The Utah Supreme Court's decision in this case is solely the product of a highly regulated liquor industry unique to Utah. The lower decision is consistent with precedents of this court which address a state's right to control all aspects of the alcoholic beverage industry. The anti-discrimination provisions of Utah law are explicit and constitute a rational exercise of state authority under the Twenty-first Amendment. Therefore, no reason exists to grant the petition for certiorari.

RESPECTFULLY SUBMITTED this 22nd day of April, 1996.

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